Supreme Court, U.S.
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95-842

No.

In The

Supreme Court of the United States

October Term, 1995

YVONNE RAMSDELL,

Petitioner,

vs.

MACHIAS SAVINGS BANK, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Was it a denial of Petitioner Yvonne Ramsdell's right to procedural due process provided by the Fifth and Fourteenth Amendments to strike completely her response to a motion for summary judgment on the grounds that:

> (a) the objection was filed one day late in violation of Local Rule 19(c) of the United States District Court for the District of Maine; and
>
> (b) that her response to the motion contained "irrelevant, immaterial and prejudicial statements" in violation of Rule 12(f) of the Federal Rules of Civil Procedure,

as opposed to some lesser sanction that would have preserved the Petitioner's right to respond to a motion seeking dismissal of her Complaint?

LIST OF PARTIES

The parties to the proceeding are:

Petitioner: Yvonne Ramsdell; and

Respondents: Machias Savings Bank; Edward L. Hennessey, Jr., individually and as a Director of Machias Savings Bank; and Frederic Reynolds, Richard Bagley, Clyde R. Crane, Charles A. Dinsmore, Jeffrey L. Goding, Gregory R. Coffin and Donald A. Foster, as directors of Machias Savings Bank.

There are no parent or subsidiary corporations to be identified as required by Rule 29.6 of the Rules of the Supreme Court.

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OPINIONS BELOW

The District Court adopted the Recommended Decision of the Magistrate Judge dated December 8, 1994, and dismissed this action. *See* pages 23a-34a of the Appendix to this Petition for Certiorari ("App. 23a-34a"). The District Court ordered the dismissal of Petitioner Yvonne Ramsdell's Complaint by Order dated January 3, 1995 (App. 15a-16a). The Court found that the Petitioner had failed to respond to the Respondents' motion for summary judgment in a timely manner and, pursuant to Local Rule 19(c) of the District of Maine, was deemed to have consented to the Respondents' statement of facts submitted in support of their motion to the extent that such statement of facts was supported by appropriate record references.

The threshold finding was based upon an Order of the Magistrate Judge dated December 6, 1994, granting the Respondents' motion to strike Petitioner Ramsdell's objection to the Respondents' motion for summary judgment on the grounds that the objection and supporting papers were filed one day late and the papers filed by Mrs. Ramsdell in support of her objection contained irrelevant, immaterial and prejudicial statements in violation of Federal Rule of Civil Procedure Rule 12(f) (App. 35a-37a). The Magistrate Judge entered the Order striking the objection before Petitioner had an opportunity to respond on the basis of the Court's inherent authority to enforce local rules *sua sponte* (App. 37a). The Magistrate Judge treated Petitioner Ramsdell's objection to the motion to strike her response as a request for reconsideration and then denied that request by Order dated December 12, 1995 (App. 17a-22a).

Based upon the Respondents' un-rebutted statement of facts, the District Court found in favor of the Respondents on their motion for summary judgment. Judgment was entered on January 26, 1995 (App. 14a).

Petitioner filed a notice of appeal to the United States Court of Appeals for the First Circuit on February 6, 1995. Following oral argument, the Court of Appeals affirmed the District Court on August 30, 1995.

STATEMENT OF JURISDICTION

Petitioner Yvonne Ramsdell now asks this Court for a Writ of Certiorari to issue to the United States Court of Appeals for the First Circuit for consideration of the issue presented herein. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED

This Petition involves the application of Local Rule 19(c) of the District of Maine which states as follows:

> **Rule 19. Motions and Memoranda of Law**
>
> **(c) Objections to Motions.** Unless within ten (10) days after the filing of a motion, the opposing party files written objection thereto, incorporating a memorandum of law, the opposing party shall be deemed to have waived objection. The 10-day period prescribed herein shall be determined in accordance with Fed. R. Civ. P. 6(a) and the Clerk shall, in every instance, add 3 days to such period for the possibility that the service of the motion may have been accomplished by mail.
>
> Any objections shall be filed in duplicate and shall include citations and supporting

> authorities and affidavits and other documents setting forth or evidencing facts on which the objection is based. The deemed waiver imposed herein shall not apply to motions filed during trial.

In addition this Petition involves Rule 12(f) of the Federal Rules of Civil Procedure which provides as follows:

> **Rule 12. Defenses and Objection - When and how Presented - By Pleading or Motion - Motion for Judgment on the Pleadings.**
>
> **(f) Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

STATEMENT OF THE CASE

A. Procedural History

Petitioner Yvonne Ramsdell is a resident of Machias, Maine. She guaranteed commercial loans made by Machias Savings Bank to her husband's business, Ramsdell Construction Company. It is alleged in the Complaint that the President of Machias Savings Bank is an officer of and has an indirect

financial stake in a competing business, and that the Bank acted in bad faith in the loan transactions in order to protect the Bank President and the competitor. Furthermore, this case alleges that Mrs. Ramsdell need not have signed these guarantees in the first instance because Machias Savings Bank's policy, requiring every wife to guarantee her husband's loans from the bank regardless of the creditworthiness of the husband, violates the Federal Equal Credit Opportunity Act (15 U.S.C. § 1691 *et seq.*, and 12 C.F.R. § 202.1 *et seq.*).

The Complaint was filed by the Petitioner in the United States District Court on April 14, 1994, against the Respondents and the United States Small Business Administration ("SBA"). Jurisdiction was claimed by Petitioner in the District Court pursuant to 15 U.S.C. § 1691e(f) (relating to the Equal Credit Opportunity Act) and 28 U.S.C. §§ 1346(b) and 15 U.S.C. § 634(b)(1) (relating to actions brought against the SBA). The Defendants in the District Court answered the Complaint in a timely manner. The Petitioner and the SBA settled their differences and judgment was entered by consent on January 26, 1995, dismissing Petitioner's claims against the SBA.

This Petition centers on the Respondents' motion for summary judgment filed in the District Court on November 2, 1994. The Respondents filed a comprehensive motion with a substantial supporting memorandum, affidavits and other papers. Pursuant to Local Rule 19(c) of the District Court, Petitioner's objection and supporting papers were required to be filed in 10 days, *i.e.*, by November 21, 1994. The Petitioner did not file her objection on November 21. The objection was filed by hand delivery on the morning of November 22. No request was made by Petitioner for an enlargement of time to file her objection on November 22. *See* the findings of the Magistrate Judge in his Order dated December 12, 1995 (App. 17a).

The Respondents filed a motion to strike the Petitioner's objection to the motion for summary judgment pursuant to Local Rule 19(c) on the grounds that the objection was late and to strike the entire response pursuant to Federal Rule of Civil Procedure 12(f) on the grounds that the papers contained "immaterial, irrelevant and prejudicial statements." Acting *sua sponte*, before the time expired to object to the motion to strike, the Magistrate Judge granted the Respondents' motion and struck Petitioner's entire objection from the record (App. 35a). The Magistrate Judge then considered Respondents' motion for summary judgment as though Petitioner consented to the Respondents' statement of facts. On December 8, 1994, the Magistrate Judge recommended summary judgment in favor of the Respondents dismissing the Complaint (App. 23a).

Prior to entry of the recommended decision, Petitioner did object in a timely manner on December 7, 1994, to the Respondents' motion to strike her objection to the motion for summary judgment. The Magistrate Judge treated the objection as a request for reconsideration of the Order striking the objection and for reconsideration of the recommended summary judgment. Following a review of the factors for reconsideration, the Magistrate Judge denied the request for reconsideration and affirmed the recommendation for summary judgment on December 12, 1994 (App. 17a).

Objection was taken by petitioner to the Magistrate Judge's recommendation. On January 3, 1995, the District Court accepted the recommended decision as submitted (App. 15a). Final judgment was entered in the District Court on January 26, 1995. On February 2, 1995, appeal was taken to the United States Court of Appeals for the First Circuit pursuant to 28 U.S.C. § 1291. The Court of Appeals affirmed the Judgment of the District Court finding, *inter alia*, that the Petitioners' objection was properly stricken (App. 2a). The constitutional implications

of the application of Local Rule 19(c) and Federal Rule of Civil Procedure 12(f) raised by Petitioner in the District Court and on appeal were not specifically addressed by the Court of Appeals.

B. Statement of Facts

This Petition presents a question of procedural due process. The relevant facts are neither extensive nor in material contest.

The Respondents moved for summary judgment in a commercial dispute involving complex questions of fact and law. The respondents submitted a statement of material fact in support of their position and as required by Local Rule 19 as follows:

> **(b) Motions for Summary Judgment.**
>
> (1) In addition to the material required to be filed by this rule, a motion for summary judgment shall incorporate a short and concise statement of material facts, supported by appropriate record citations, as to which the moving party contends there is no genuine issue to be tried.

The motion for summary judgment had to be answered within 10 days as provided by Local Rule 19(c). Petitioner's counsel could not physically complete the printing, copying and collating of multiple copies of the response within the allotted time. The objection included a 52 page memorandum of law and several hundred pages of supporting affidavits, excerpts of deposition transcripts and evidentiary exhibits. In order to mitigate any prejudice as a result of the inability to meet the deadline, the entire response was hand-delivered on the next day to the Court in Bangor about 140 miles away and to counsel for the Respondents.

The tardy delivery was met with a motion filed by the Respondents on December 2, 1994 (13 days after the Petitioner's objection was filed) to strike the objection pursuant to Federal Rule of Civil Procedure 12(f). The motion to strike was granted by the District Court on December 6 before the Petitioner filed her objection to the motion to strike on December 7.

The consequence of the District Court's action was that Mrs. Ramsdell was not heard in opposition to the motion for summary judgment. She was not able to submit a statement of contrary and/or disputed facts. Her legal argument was not fully considered, particularly in the context of her version of the facts of the case. The District Court and the Court of Appeals found no evidence in the Respondents' statement of facts to support any of the Petitioner's claims. It is submitted that the Complaint was dismissed as a direct result of the inability to be heard.

REASONS FOR GRANTING THE WRIT

I.

SUMMARY

Petitioner contends that the striking of her objection to a motion for summary judgment is an inappropriate and unconstitutional sanction for a minor violation of procedural rules. Any number of alternative sanctions could have been imposed upon Petitioner or her counsel for a violation of Local Rules. A lesser sanction would have compensated the court and opposing parties for any resulting prejudice or which would have served as a deterrent against future violations of court rules. Striking of the motion response was a violation of procedural due process accorded by the Fifth and Fourteenth Amendments to the Constitution.

II.

LOCAL RULE 19(c) IS A PROCEDURAL REQUIREMENT INTENDED TO AID EFFECTIVE ADMINISTRATION OF THE TRIAL COURT DOCKET AND SHOULD NOT BE USED TO ELIMINATE CASES WHICH THE DISTRICT COURT FINDS TO BE WITHOUT ADEQUATE MERIT ON PRELIMINARY REVIEW IF A MONETARY SANCTION OR SOME OTHER LESS STRINGENT REMEDY IS APPROPRIATE.

The District Court's ability to prescribe local rules for the conduct of its business is specifically provided in 28 U.S.C. § 2071 and in Federal Rule of Civil Procedure 83. The trial court has a need to manage its docket and to move cases toward disposition in an expeditious manner. The trial court's power to regulate its business is limited only by the requirements (a) in Rule 83 and that such rules be consistent with the Federal Rules of Civil Procedure and (b) that such local rules are in conformity with due process assured by the Fifth and Fourteenth Amendments. *See Frazier v. Heebe*, 482 U.S. 641, 645, 107 S. Ct. 2607, 2611, 96 L. Ed. 2d 557 (1987) (citations omitted). The keystone case for the evaluation of procedural due process is *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). One must balance expeditious processing of the Court's work against basic notions of fair play. *Id.*, 424 U.S. at 334, 96 S. Ct. at 902-903.

Nearly every District Court has adopted a local rule mandating the filing of a response to a motion within a specific period of time. *See* 12 Wright & Miller, *Federal Practice and Procedure: Civil* § 3154 (1973). A penalty is established for the respondent's failure to observe the deadline and, frequently, the penalty is the respondent's automatically presumed consent to the motion.

Motions for summary judgment pursuant to Federal Rule of Civil Procedure Rule 56 are given special consideration under local rules requiring a timely response. The reason for the differentiation is the provision in Rule 56(c) imposing a burden upon the moving party to adumbrate the absence of fact and to prove his entitlement to relief as a matter of law. *See Celotex Corporation v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). Summary judgment is not to be entered automatically if the respondent fails to object because the District Court must first find that the moving party has satisfied his burden. The failure to respond to the motion for summary judgment has diverse results in the Circuits.

The District of Maine's Local Rule 19(c) states that the penalty for failure to object to a motion for summary judgment is constructive consent to the statement of facts submitted by the moving party. The Court of Appeals for the First Circuit has found this result to be in conformity with Rule 56(c). *See Jaroma v. Massey,* 873 F.2d 17, 20 (1st Cir. 1989). A failure to object has a slightly different result in the Ninth Circuit. The accepted Rule in the Ninth Circuit is that the District Court *may* grant summary judgment if there is no objection.

The prevailing rule in the Ninth Circuit is that there is no automatic acceptance of the moving party's statement of facts. The District Courts in the Ninth Circuit make a review of the unopposed motion without any threshold barriers, and they retain full discretion whether the motion should be granted. *See Brydges v. Lewis,* 18 F.3d 651, 652 (9th Cir. 1994). An untimely objection is rejected in the Ninth Circuit only in the most extreme circumstances. The response was disregarded in *Brydges* only because the respondent failed to heed a warning from the Court that a response was required. *Id.* at 653. The Ninth Circuit has established a 5 part test that must be applied before any case can be dismissed as the result of an untimely response to a motion for

summary judgment. The key factors are prejudice to the moving party arising as a result of the admission of the late objection and the availability of alternative sanctions. *See Henry v. Gill Industries, Inc.*, 983 F.2d 943, 948 (9th Cir. 1993). Other Circuits seem to be in accord and permit discretionary rejection of an untimely response in only the most egregious circumstances. *See, e.g., Carver v. Bunch*, 946 F.2d 451, 454 (6th Cir. 1991) (failure to respond to a motion to dismiss, standing alone, does not constitute failure to prosecute justifying dismissal). On the other hand, the Fifth Circuit seems to be in accord with the First Circuit. *See John v. Bd. of Trustees for State Colleges and Universities*, 757 F.2d 698, 709-710 (5th Cir. 1985).

The purpose of the District of Maine's Local Rule 19 is to expedite the docket. The rationale for Local Rule 19(c) was explained in *McDermott v. Lehman*, 594 F. Supp. 1315 (D. Me. 1984). The District Court balanced the policy of Rule 56 favoring the disposition of motions for summary judgement in a contested hearing against the essential need for orderly and efficient administration of motion practice. The District Court reached a compromise by stating that "(I)n order to accommodate the policy of Rule 56 favoring disposition of summary judgment motions on the merits, the deemed waiver provision of Local Rule 19(c), with respect to motions for summary judgment, should be limited to waiver of objection to the movant's factual assertions." *Id.* at 1321. The District Court recognized that a party might be non-suited in a viable case or defense as a result of a technical violation. *Id.* at 1320. The District Court has found that the most trivial violation of the timeliness rules of court must take precedence over the possible, inappropriate non-suiting of the respondent by eliminating any contest of fact. The moving party wins if he can construct any rationale theory to support his defense from the selected record references that he supplies to the Court.

The dismissal of a cause of action for non-compliance with procedural rules is the most extreme sanction that can be imposed. Dismissal, whether direct or indirect, should be granted only to avoid the most extreme prejudice to the moving party. The rule applied in the Ninth Circuit recognizes and protects this procedural fairness. The mechanical, ministerial rule in this case is excessive.

The right to a hearing is elementary to due process. For example, this Court found that procedural rulings causing the dismissal of a party can be a violation of the Fifth Amendment. *See Societe Internationale v. Rogers*, 357 U.S. 197, 209, 78 S. Ct. 1087, 1094, 2 L. Ed. 2d 1255 (1958). Similarly, the Fourteenth Amendment has been applied when procedural rules deny an applicant the right to be heard. *See Boddie v. Connecticut*, 401 U.S. 371, 380, 91 S. Ct. 780, 787, 28 L. Ed. 2d 113 (1971). More recently, this Court confirmed the applicability of due process principles to procedural rules that limit or frustrate the right of a litigant to a full hearing on the merits in *Logan v. Zimmerman Brush Company*, 455 U.S.422, 434, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982). In each case, the test of constitutionality was governed by the tests enunciated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950), *i.e.*:

(A) the importance of the private interest affected;

(B) the risk of erroneous deprivation under the system challenged;

(C) the protective value of the different procedures proposed; and

(D) the government's interests, including any fiscal and administrative burdens created by different procedures.

See also, Mathews v. Eldridge, supra.

The Petitioner submits that the blind application of Local Rule 19(c) in this case violates her rights to due process. The procedure apparently used in the Ninth Circuit provides a more equitable formula better satisfying the balancing tests. The District Court found no material effect upon the moving party as a result of a one day delay in filing. Petitioner submits that her inability to submit extensive and substantial evidence in support of her claim deprived her of her claim as anticipated by the District Court in *McDermott v. Lehman*, 594 F. Supp. at 1320. A monetary sanction would have provided adequate compensation to the Respondents for any damage or prejudice suffered as a result of the *de minimis* delay in responding to their motion. Furthermore, an appropriate monetary sanction would be just as effective to cause a litigant to conform in a punctilious manner to the Rules of the District of Maine.

A review of this case and reversal of the decision of the First Circuit Court of Appeals not only will protect the rights of this litigant, but also will create uniformity among the Districts in the sanction applied for failure to comply with the time requirements of local rules for response to motions for summary judgment.

III.

THE USE OF FEDERAL RULE OF CIVIL PROCEDURE 12(f) BY THE DISTRICT OF MAINE TO STRIKE RESPONSES TO MOTIONS IN WHOLE OR IN PART IS INCONSISTENT WITH PRINCIPLES OF DUE PROCESS AND IS AT ODDS WITH PROCEDURES EMPLOYED IN OTHER DISTRICTS.

The Magistrate Judge first struck the Petitioner's statement of facts, then struck the Petitioner's opposing memorandum of law pursuant to Federal Rule of Civil Procedure Rule 12(f) on the basis that the document contained "immaterial, irrelevant and

prejudicial statements." The offending portions of the memorandum were not excised. The entire document was stricken and disregarded. Thus the Petitioner was silenced not only in her presentation of the facts of the case, but also in her argument of law and fact.

Petitioner's research indicates that only one other District may hold that Rule 12(f) is applicable to motion practice. Cases from across the United States indicate generally that the word "pleadings" in Rule 12(f) refers only to complaints, answers and counterclaims as provided in Rules 7, 8 and 12(a). Rule 11(a) specifically differentiates between "pleadings" and "motions." Rule 12(f) simply is not applied to motions in any other federal jurisdiction with the possible exception of the District of New Hampshire. *See, e.g., Hrubec v. National Railroad Passenger Corp.*, 829 F. Supp. 1502, 1506 (N.D. Ill. 1993); *Mahon v. City of Largo, Florida*, 829 F. Supp. 377, 385 (M.D. Fla. 1993); *F.D.I.C. v. Niblo*, 821 F. Supp. 441, 448 (N.D. Tex. 1993); *Morales v. Digital Equipment Corp.*, 669 F. Supp. 1173, 1183 (D.P.R. 1987). The District of Maine unilaterally expands the application of Rule 12(f) beyond "pleadings" to motions and other papers. Petitioner believes that only this case and *Nault's Automobile Sales, Inc. v. American Honda Motor Company, Inc.*, 148 F.R.D. 25 (D.N.H. 1993) can be construed to find Rule 12(f) to be applicable to motion practice.

It is well recognized that a motion to strike under Rule 12(f) is a 'time waster' and ought to be denied unless allegations in a pleading have no relationship to the case, prejudice the opposing party, are so loathsome as to reflect cruelly and unfairly upon the opposing party, or are so repulsive as to be an affront to the dignity of the Court. *See Nault's*, 148 F.R.D. at 30 and 5A Wright & Miller, *Federal Practice and Procedure: Civil* § 1382 (2d Ed.1990) (extensive citations omitted). It is relevant that the District Court did not identify any allegations in the 52 page

memorandum that fell into the category typically found offensive. The Court identified only one irrelevancy in the 52 page submission in the Order dated December 6, 1994, which struck the entire response, i.e. a request to toll a statute of limitations was found inconsistent with the relief requested in the Complaint (App. 36a). Upon reconsideration, the Court found in its December 12, 1994, Order one additional irrelevancy, *i.e.*, an embezzlement from the Ramsdell Construction Company was not alleged specifically in the Complaint and, furthermore, Machias Savings Bank was only partly responsible for the embezzlement. Contrary to conventional construction of Rule 12(f), the District Court did not identify a single allegation that violated the standards established for Rule 12(f).

One can conclude only that the District of Maine intends to use Rule 12(f) as a tool to screen cases and deny plaintiffs an opportunity to be heard in cases that the Court finds to be of doubtful merit.

The District Court has a generally recognized right to raise summary judgment on its own motion. *See Celotex Corporation v. Catrett*, 477 U.S. at 325, 106 S. Ct. at 2554. However, the District Court did not raise summary judgment in this case because it rejected the Petitioner's facts and argument before considering or granting summary judgment. It appears that the District Court might have used Rule 12(f) as grounds for avoiding the arduous review of this motion after determining superficially that the case was without merit.

The screening of cases was specifically considered and prohibited in *Brown v. Crawford County, Georgia*, 960 F.2d 1002, 1008-1009 (11th Cir. 1992). The Eleventh Circuit found that the pre-screening of motions for summary judgment violated rights under Federal Rule of Civil Procedure 56(e) to bring motions for summary judgment. Accordingly, one must conclude that Rule

56(c) permits a respondent to file whatever memorandum, affidavits and other evidentiary material that he/she chooses to present in opposition to the motion. Screening a response under the guise of Rule 12(f) is simply inappropriate and a denial of the Petitioner's procedural and constitutional right to be heard in opposition.

CONCLUSION

The application of Local Rule 19(b) and Federal Rule of Civil Procedure 12(f) to strike Petitioner's entire response to a motion for summary judgment is a violation of Petitioner's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

The application of Local Rule 19(b) resulted in the dismissal of the case when other, less stringent remedies would have cured any prejudice and served as a deterrent. Local Rule 19(b) elevates form over substance by making compliance with procedural rules more important than a decision on the merits of the suit. The Petitioner submits that this mechanical acceptance of the movant's view of the facts is contrary to preferable practice found in other Circuits.

The use of Federal Rule of Civil Procedure 12(f) to strike the entirety of Petitioner's response to the motion for summary judgment constitutes a novel interpretation of the Rule found in not more than one other District. The rejection of the response denied Petitioner her right to be heard. The screening or elimination of cases on the basis that a motion paper may include unspecified irrelevant, immaterial or impertinent material is inconsistent with Federal Rule of Civil Procedure 56(c) and violates a basic requirement of Federal Rule of Civil Procedure 83. Again this practice appears to be unique to the District of Maine.

Petitioner Yvonne Ramsdell requests reversal of the Decision of the United States Court of Appeals for the First Circuit and remand of the case to the District Court of Maine for further hearing on trial on the merits.

Dated: November 28, 1995

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AUGUST 30, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1148

YVONNE RAMSDELL,

Plaintiff, Appellant,

v.

ERSKINE BOWLES, ET AL.

Defendants, Appellees.

JUDGMENT

Entered: August 30, 1995

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court

FRANCES P. SCIGLIANO
Clerk.

[cc: Messrs. Dyer, Morrell]

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED AUGUST 30, 1995

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1148

YVONNE RAMSDELL,

Plaintiff-Appellant,

v.

ERSKINE BOWLES, ET AL.

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Morton A. Brody, *U.S. District Judge*]
[Hon. Eugene W. Beaulieu, *U.S. Magistrate Judge*]

Before

Boudin, *Circuit Judge*,
Campbell, *Senior Circuit Judge*,
and Schwarzer,* *Senior District Judge*.

Ralph A. Dyer, with whom *Law Offices of Ralph A. Dyer, P.A.*, was on brief for appellant.

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* Of the District of Northern California, sitting by designation.

Appendix B

Stephen G. Morrell, with whom *Judy A.S. Metcalf* and *Eaton, Peabody, Bradford & Veague, P.A.,* were on brief for appellees.

August 30, 1995

SCHWARZER, ***District Judge.*** Yvonne Ramsdell brought suit against Machias Savings Bank and its directors (collectively the "Bank") alleging claims arising out of a series of loan transactions in which the Bank provided financing to Ramsdell Construction Company ("Ramsdell"), owned by Mrs. Ramsdell's husband and son. Because Mrs. Ramsdell alleged a violation of the Equal Credit Opportunity Act (the "ECOA"), 15 U.S.C. §§ 1691-1693 (1988), the district court had jurisdiction over that claim under 28 U.S.C. § 1331 and over the supplemental state law claims under 28 U.S.C. § 1367. Mrs. Ramsdell now appeals the district court's grant of the Bank's motion for summary judgment. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

Ramsdell Construction Company was engaged in the construction business in Machias, Maine. In 1989 and 1991, it obtained loans from the Bank to finance its operations. In early 1992, having defaulted on the loans, Ramsdell decided to obtain additional financing to enable it to complete a construction project for which it had a contract with the Town of Lubec, Maine. The Bank agreed to make the loan on the condition that the loan would be guaranteed by the Small Business Administration (the "SBA") and that Mrs. Ramsdell would also sign a personal guarantee. This loan, sometimes referred to as the SBA loan, closed in June 1992. Meanwhile Ramsdell continued work on the Lubec project with interim financing from the Bank. At the closing, $75,000 of the loan proceeds was used to set off

advances the Bank had made in the interim to finance the work. Notwithstanding this infusion of funds, Ramsdell defaulted on the Lubec contract in the fall of 1992 and went into bankruptcy. Foreclosure proceedings were brought in the state court against Mrs. Ramsdell and others who were borrowers or guarantors of the loans. Apparently, discovery taken in the state court action was later used by the parties in the instant action.

PROCEDURAL BACKGROUND

The complaint, filed on April 14, 1994, alleged that the Bank had violated the ECOA (Count I), breached the loan agreement with Ramsdell (Count II), interfered with plaintiff's and Ramsdell's advantageous relationships (Counts IV, VI and VII), violated its duty of good faith and fair dealing (Count V), and acted negligently (Count VIII). It also alleged that individual defendants had aided and abetted the breach (Count III) and had interfered with advantageous relationships (Counts IV and VII). Additional counts have been abandoned on appeal. Originally, the complaint also named the SBA as a defendant; however, the claims against the SBA were later dismissed.

The Bank filed a motion for summary judgment on November 2, 1994. Mrs. Ramsdell moved for an extension of time to file her opposition until November 21, 1994 (the date on which it would have been due, in any event, under Local Rule 19(c) of the District of Maine). She filed her opposition on November 22, 1994, one day late. On December 2, 1994, the Bank moved to strike the opposition as untimely and further asked that certain marked material be struck as immaterial or as barred by an earlier confidentiality order issued by the court. On December 6, 1994, the magistrate judge granted the motion to strike, before objections had been filed; on December 8, 1994, he filed his recommended decision granting summary judgment.

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After receiving the objections, the magistrate judge treated them as a motion for reconsideration, which he denied by order of December 12, 1994. Mrs. Ramsdell then filed a brief seeking *de novo* review of the magistrate judge's recommended decision; on January 3, 1995, the district court issued its order adopting the recommended decision and granting judgment for the Bank.

THE MOTION TO STRIKE

In his initial order granting the motion to strike, the magistrate judge, relying on the court's inherent power to enforce its rules, concluded that although the court is "usually generous to those who miss by slight amounts various limitations on pleadings . . . Plaintiff's response to the Motion for Summary Judgment is properly stricken." (R. 102.) The magistrate judge found that a chart Mrs. Ramsdell offered in support of the opposition was "not authenticated and ha[d] no evidentiary value" and that the opposition was "replete with 'immaterial, irrelevant and prejudicial statements.' " (R. 100-01.) On reconsideration, the magistrate judge applied the seven factors we suggested district courts examine when exercising their discretion in ruling on a motion for reconsideration of a dismissal order entered due to a plaintiff's failure to file a timely opposition to a motion, viz:

> (1) the nature of the case, (2) the degree of tardiness (3) the reasons underlying the tardiness, (4) the character of the omission, (5) the existence *vel non* of cognizable prejudice to the nonmovant in consequence of the omission, (6) the effect of granting (or denying) the motion on the administration of justice, and (7) whether the belated filing

would, in any event, be more than an empty exercise.

United States v. Roberts, 978 F.2d 17, 21-22 (1st Cir. 1992). Acknowledging the district court's "great leeway in the application and enforcement of its local rules," we held in *Roberts* that a refusal to grant relief on reconsideration is reviewed for abuse of discretion. *Id.* at 20. "In making discretionary judgments, a district court abuses its discretion when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales." *Id.* at 21.

We are satisfied that the magistrate judge gave appropriate consideration to each of the relevant factors. First, we note that here, unlike in *Roberts*, there was no question about Local Rule 19(c)'s interpretation or its application to the facts of the case. *Compare Roberts*, 978 F.2d at 19-20. Although Mrs. Ramsdell argued in her reply brief that her opposition was in fact filed in a timely manner under Local Rule 19(c) and Fed. R. Civ. P. 6(a), she waived that argument both by failing to raise it in the district court and by failing to raise it in her opening brief on appeal. *See, e.g., Aetna Casualty Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1571 (1st Cir. 1994) (appellant failed to preserve issue for appeal by failing to raise it at trial and by failing to raise it in opening brief on appeal); *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983) (arguments not presented in initial brief on appeal are waived).[1]

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1. Even if Mrs. Ramsdell had preserved the issue of whether her opposition was in fact timely filed under Local Rule 19(c) and Fed. R. Civ. P. 6(a), her (Cont'd)

Moreover, we note that Mrs. Ramsdell was represented by Maine counsel who was on notice that Local Rule 19 was being strictly enforced and that neglect was not an acceptable excuse. *See Cardente v. Fleet Bank of Maine, Inc.*, 146 F. Supp. 13, 20-22 (D. Me. 1993); *Winters*, 812 F. Supp. at 4; *Greene v. Union Mut. Life Ins. Co. of Am.*, 764 F.2d 19, 23 (lst Cir. 1985) (district court reasonably found breakdown of counsel's office procedures not an adequate excuse for late filing).

Finally, Mrs. Ramsdell failed to show that she suffered prejudice as a result of the magistrate judge striking her opposition to the motion for summary judgment. The magistrate judge acted pursuant to Local Rule 19(c), which states in relevant part:

> Unless within ten (10) days after the filing of a motion the opposing party files written objection thereto, incorporating a memorandum of law, the opposing party shall be deemed to have waived objection.

Following the interpretation of Local Rule 19(c) previously explicated by the District of Maine in *F.D.I.C. v. Bandon Assocs.*, 780 F. Supp. 60, 62 (D. Me. 1991), the magistrate judge ruled that the penalty embodied in Rule 19(c) amounts to only a limited

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(Cont'd)
application of the rules is incorrect. Regarding the operation of Local Rule 19(c), the District of Maine has previously held that although the prescribed 10-day response period excludes weekends and holidays per Fed. R. Civ. P. 6(a), the three-day mailing period does not. *See, e.g., Winters v. F.D.I.C.*, 812 F. Supp. 1, 4 (D. Me. 1992). The three extra days for mailing objections filed pursuant to Local Rule 19(c) are "clearly calendar days." *Id.* Mrs. Ramsdell's argument that her opposition was due November 22, 1994, depends on a calculation that excludes weekend days from the three-day mailing period. Thus her argument fails.

waiver: "[A] failure to respond to a Motion for Summary Judgment does not amount to a waiver of Plaintiff's objection. . . . [A] party who fails to object in a timely fashion is deemed to have consented to the moving party's statement of facts to the extent that statement is supported by appropriate record citations." (R. 103, citation and internal quotation marks omitted.) And, as the judge further observed, summary judgment is appropriate only if the record before the court establishes that the moving party is entitled to judgment as a matter of law. *See Winters,* 812 F. Supp. at 2. Therefore, the striking of Mrs. Ramsdell's opposition did not bar her from obtaining a favorable ruling based on issues of law presented by the motion if she was entitled to one. Moreover, had the judge ignored disputed material issues of fact as a result of striking the opposition, she could have called them to our attention in her brief on appeal; but she failed to do so.

We conclude that the magistrate judge did not abuse his discretion in striking the opposition.

THE SUMMARY JUDGMENT

We turn then to review of the judgment below on the merits, pursuant to the applicable *de novo* standard of review. *E.H. Ashley & Co. v. Wells Fargo Alarm Services,* 907 F.2d 1274, 1277 (lst Cir. 1990).

The ECOA Violations

Count I of the complaint alleges that the Bank violated the ECOA by demanding that Mrs. Ramsdell guarantee each of the three loan transactions between the Bank and the Ramsdells. The ECOA makes it "unlawful for any creditor to discriminate against

any applicant, with respect to any aspect of a credit transaction — (1) on the basis of . . . marital status. . . ." 15 U.S.C. § 1691 (a)(1) (1988). The first two loan transactions in which the Bank demanded guarantees from Mrs. Ramsdell occurred in 1989 and 1991; thus, the alleged violations based thereon occurred more than two years before Mrs. Ramsdell filed her complaint. *See Farrell v. Bank of N.H.— Portsmouth,* 929 F.2d 871, 873 (1st Cir. 1991) (violation deemed to occur when lender makes demand for spouse's signature). The ECOA provides that "no . . . action shall be brought more than two years from the date of the occurrence of the violation . . . ." 15 U.S.C. § 1691e(f) (1988).

Mrs. Ramsdell does not dispute that the statute has run but argues that "equitable tolling is available under the ECOA to avoid an onerous two year limitation period. . . ." (Appellant's Br. at 32.) As we noted in *Farrell,* however, Congress in 1976 extended the limitations period from one to two years to afford claimants a reasonable time to bring an action. *Farrell,* 929 F.2d at 874. In light of Congress' deliberate exercise of its judgment regarding what is a reasonable time limit, that limit should not lightly be circumvented as onerous. While equitable tolling may be available in a proper case, *see id.,* the mere fact that plaintiff has let the time to file run is not sufficient to invoke equitable intervention. Mrs. Ramsdell has come forward with no facts on which equitable intervention might be grounded.

The third loan transaction took place in May 1992, within the two year period. At the closing, the Bank required Mrs. Ramsdell to sign both a note evidencing the loan and a guarantee. The regulations issued by the Board of Governors of the Federal System interpreting the ECOA provide in relevant part that "a creditor shall not require the signature of an applicant's spouse . . . on any credit instrument *if the applicant qualifies under the*

creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1) (1992) (emphasis added). The district court found that Ramsdell and Mr. Ramsdell were not "qualifie[d] under the creditor's standards of creditworthiness for the amount and terms of the credit requested." (R. 107, 175.) The court based this finding on three observations: (1) that the Bank had issued notices of default on the 1989 and 1991 loans; (2) that the Bank had insisted that $75,000 of the 1992 SBA loan be applied to the defaulted loans; and (3) that there was no evidence to the contrary. *Id.*

Mrs. Ramsdell now challenges the court's finding on two grounds. First, she argues that there was no question of creditworthiness because the $75,000 payment was intended to cover the Bank's risk under the new loan. But the complaint itself alleges that the existing loans had an outstanding principal balance of $900,000, and the Bank's directors authorized the additional working capital line only on the condition that the Bank's overall loss exposure not be increased. Given that exposure, Ramsdell's lack of creditworthiness was an issue not reasonably disputable.

Second, citing 12 C.F.R. § 202.2(p), Mrs. Ramsdell argues that the burden of proving lack of creditworthiness was on the Bank. But that section defines credit scoring systems and says nothing about the burden of proof under the ECOA. Section 202.7(d)(1) triggers liability under the act by specifying the condition under which it is unlawful to require the signature of an applicant's spouse, viz, when the applicant is creditworthy. We do not read that section as creating an affirmative defense for banks premised on their proving lack of creditworthiness. Thus, the burden was on Mrs. Ramsdell to come forward with proof that Ramsdell and Mr. Ramsdell were creditworthy. She offered none.

Appendix B

Breach of Contract

Count II of the complaint alleges that "SBA loan proceeds were improperly diverted by the Bank for its benefit" in breach of the loan agreement. The loan agreement, by its terms, unambiguously provided that "interim financing utilized for the [Lubec contract and working capital] may be repaid from loan proceeds." (Complaint ¶ 36.) The court determined that "interim financing" referred to the $75,000 that the Bank had advanced to Ramsdell prior to the closing of the loan to enable Ramsdell to continue work on the Lubec contract. If interim financing was intended to exclude the $75,000 advance, the burden was on Mrs. Ramsdell to come forward with facts creating a triable issue. She did not do so.

Aiding and Abetting Breach of Contract

Count III charges the Bank's directors with authorizing and directing the diversion of the $75,000. In view of our disposition of the diversion claim, this claim also fails.

Interference with Advantageous Contractual Relations

Count IV alleges that the Bank interfered with Mrs. Ramsdell's contract with the SBA by wrongfully diverting proceeds from the SBA loan. In view of our disposition of the diversion claim, this claim fails.

Breach of Contract — Bad Faith

Count V alleges that the Bank violated its duty of good faith and fair dealing owed to Mrs. Ramsdell by diverting proceeds from the SBA loan and interfering with Ramsdell's financial

affairs. Maine recognizes that the Uniform Commercial Code imposes a duty of good faith and fair dealing on banks, "requiring 'honesty in fact in the conduct or transaction concerned.' " *First NH Banks Granite State v. Scarborough*, 615 A.2d 248, 250 (Me. 1992); *see also Diversified Foods, Inc. v. First Nat. Bank of Boston*, 605 A.2d 609, 614 (Me. 1992) (no evidence that banks "acted dishonestly, with ulterior motives, or for anything other than business reasons in exercising their rights under the loan agreement"). No facts appear here to support a claim that the Bank acted dishonestly or otherwise improperly with respect to its contract with Mrs. Ramsdell.

Interference with Advantageous Contractual Relations

Counts VI and VII allege interference with the contractual relations between Ramsdell and the Town of Lubec. Mrs. Ramsdell argues, in her reply brief, that these counts "are tort actions for interference with a property right. They are not claims for breach of contract." (R. Br. 21.) But she has failed to establish a property right of her own in the contract between Ramsdell and the Town of Lubec to support such a claim. *See Harmon v. Harmon*, 404 A.2d 1020, 1024 (Me. 1979) (requiring proof that plaintiff, "but for tortious interference of another, . . . would in all likelihood have received a gift or a specific profit from a transaction. . . ."). Lacking such proof, she attempts to rely, presumably by analogy, on third party beneficiary principles, claiming to be a beneficiary of the Lubec contract. Under Maine law, however, a person must demonstrate that she is an *intended* beneficiary of a contract to maintain an action for its breach. *F.O. Bailey Co. v. Ledgewood, Inc.*, 603 A.2d 466, 468 (Me. 1992) (emphasis added). The *Ledgewood* court, following the Restatement (Second) of Contracts § 302, held that it is not enough for a plaintiff to show that she benefitted from a contract;

she must come forward with evidence of a "clear and definite" intent on the promisee's part that the plaintiff receive an enforceable benefit under the contract. *Id.* No such evidence has been offered here.

Negligence

Count VIII makes two allegations: (1) that the Bank negligently underestimated Ramsdell's cash requirement, thereby causing the SBA to lend Ramsdell less than the SBA would have been willing to lend and ultimately causing Ramsdell's business to fail; and (2) that Mrs. Ramsdell executed the guarantee in reliance on the Bank's representations that the Lubec contract would generate sufficient cash to repay the SBA loan. As interpreted in her brief, the count alleges a failure by the Bank to prepare cash projections, a business plan, and loan analysis in a professional manner. While those allegations might withstand a motion to dismiss, in opposing a motion for summary judgment the "adverse party may not rest upon the mere allegations . . . of the . . . adverse party's pleading but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Her brief offers none.

AFFIRMED.

APPENDIX C — JUDGMENT IN THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MAINE FILED JANUARY 26, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 94-0095-B

YVONNE RAMSDELL,

Plaintiff

v.

ERSKINE BOWLES, et al,

Defendants

JUDGMENT

In accordance with the Order accepting the Recommendation of the Magistrate Judge, entered January 3, 1995, dismissing the Machias Savings Bank defendants;

JUDGMENT is hereby entered for the defendants and against the plaintiff.

Dated at Bangor, Maine this 26th day of January, 1995.

WILLIAM S. BROWNELL, CLERK

s/ Harriett D. Jefferson
Harriett D. Jefferson
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE FILED JANUARY 3, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CIVIL 94-0095-B

YVONNE RAMSDELL,

Plaintiff

vs.

ERSKINE BOWLES et al,

Defendants

ORDER ACCEPTING THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE

The United States Magistrate Judge filed with the Court on December 8, 1994, with copies to counsel, his Recommended Decision regarding Defendant Machias Savings Bank's motion for Summary Judgment. Plaintiff filed her Objections to the Recommended Decision and Defendant has responded to those objections. I have reviewed and considered the Magistrate Judge's Recommendation, together with the entire record and have made a *de novo* determination of all matters adjudicated by the Magistrate Judge's Recommended Decision; and I concur with the recommendation of the United States Magistrate Judge for the reasons set forth in his Recommendation, and determine that no further proceeding is necessary.

Appendix D

It is therefore ORDERED as follows:

(1) the Recommendation of the Magistrate Judge is hereby AFFIRMED;

(2) the motion of Defendant Machias Savings Bank for Summary Judgment is GRANTED.

Dated at Bangor, Maine this day of January, 1995.

s/ Morton A. Brody
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MAINE FILED DECEMBER 13, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 94-0095-B

YVONNE RAMSDELL,

Plaintiff

v.

ERSKINE BOWLES, in his capacity as Administrator, United States Small Business Administration, et al.,

Defendants

ORDER

The Court struck Plaintiff's Response to Defendant Machias Savings Bank's ["MSB"] Motion for Summary Judgment on December 6, 1994. On December 7, Plaintiff filed a Response to the Motion to Strike, which the Court indicated it would construe as a Motion to Reconsider the Order Striking Plaintiff's Response.

There are several non-inclusive factors the Court should consider in determining whether to grant a motion for reconsideration. They are:

> (1) the nature of the case, (2) the degree of tardiness, (3) the reasons underlying the tardiness, (4) the character of the omission,

> (5) the existence *vel non* of cognizable prejudice to the nonmovant in consequence of the omission, (6) the effect of granting (or denying) the motion on the administration of justice, and (7) whether the belated filing would, in any event, be more than an empty exercise.

United States v. Roberts, 978 F.2d 17, 21-22 (1st Cir. 1992), *quoted in Winters v. FDIC*, 812 F. Supp. 1, 3 (D. Me. 1992). The Court will examine each in turn.

1. The Nature of the Case.

This is a civil case arising from several loan transactions between Plaintiff and the Defendant MSB for the purposes of financing Plaintiff's husband's business partnership. The business and Plaintiff's husband are both in bankruptcy. Plaintiff's claims, while certainly important to her as a last effort to retain some value out of the family business, are of no "overarching social significance." *Winters*, 812 F. Supp. at 4.

2. The Degree of Tardiness.

Plaintiff was only one day late filing her objection to Motion for Summary Judgment. This factor weighs in Plaintiff's favor.

3. The Reasons for the Tardiness.

Plaintiff offers only one reason for her delay in the filing the response. She states: "Mrs. Ramsdell was unable to accomplish the printing and binding of this extensive response on schedule and was required to file one day late."

Appendix E

It is true that Plaintiff had requested leave to file a 50-page objection to the Motion for Summary Judgment, which clearly would take a great deal of effort to prepare. If Plaintiff felt the need to file a 50-page response, Plaintiff should also have anticipated the need for additional time in which to prepare it. In fact, Plaintiff did request an enlargement of time until November 21, 1994 to file her response. The Motion was mooted on the grounds that November 21 was the original deadline, thus no enlargement was necessary. However, when the response was filed on November 22 it was unaccompanied by a request for further enlargement. Plaintiff's apparent belief that a mere one day delay should not require leave of Court is misplaced.

4. The Character of the Omission.

Although the Court agrees with Plaintiff that a one-day delay is not terribly significant, the Court finds the character of the omission somewhat troubling in this case.

On November 8, 1994, Plaintiff moved to enlarge the deadline in which to file her objection to Defendant SBA's Motion to Dismiss or for Summary Judgment to December 2, 1994. At the final pretrial conference with the Court on December 7, Plaintiff's counsel indicated that he believed his deadline to respond to that Motion had not expired, despite the fact that it was the deadline *he* requested.

Plaintiff's Motion for Enlargement of Time in which to Respond to Defendant MSB's Motion for Summary Judgment was filed with the Court on November 21, 1994 and requested an enlarged deadline of November 21. Although mistaken, it is clear Plaintiff's counsel believed the motion for enlargement was being filed after the expiration of the original deadline. However,

the motion contains no reference to the "excusable neglect" standard imposed by Federal Rule 6(b) in such cases. Further, even assuming Plaintiff's counsel mailed the motion for enlargement, it should have been clear **at that time** to Plaintiff's counsel that the printing and binding of the response was not going to be completed on time to allow the Response to be filed on November 21.

Plaintiff's final pretrial memorandum, which was due on November 30, 1994, was not filed until December 5, two days prior to the conference. When notified on December 2 by the Clerk's Office that the memorandum had not been filed, the deputy clerk was informed by Plaintiff's counsel that it was not late. It arrived on December 5 unaccompanied by so much as an acknowledgment by counsel that it **was** late. Nor did Plaintiff seek leave to file two more pages than permitted by Local Rule 20(b).

5. Prejudice.

The Court does not find that Defendants were prejudiced solely by Plaintiff's delay in responding to the Motion for Summary Judgment. To the extent they were forced, by the **content** of Plaintiff's objection, to respond with a Motion to Strike, the Court does note a degree of prejudice. This factor weighs in no one's favor.

6. Institutional Interests.

"The Court has recently reaffirmed its strong institutional interest in punctilious observance of the Local Rules. *See Cardente*, 146 F.R.D. at 23. That interest weighs heavily against Plaintiff here." *Winters*, 812 F. Supp. at 5.

Appendix E

7. Utility of the Pleading.

The Court begins this analysis by noting that Plaintiff sought leave to file a 50-page response to the Motion for Summary Judgment. The Response was actually 51 pages.

The Court has carefully reviewed Plaintiff's submission in light of Defendants' assertion in their Motion to Strike that the Response contained "immaterial, irrelevant, and prejudicial statements." In Plaintiff's argument in opposition to summary judgment on Count I of the Complaint, the Court found that Plaintiff was arguing that the statute of limitations did not apply to a portion of her claim for the reason that the Court could award equitable relief, when her complaint clearly seeks only a legal remedy. *See* Order on Motion to Strike (Docket No. 36, Dec. 6, 1994).

There are other examples, most notably accusations of embezzlement with regard to a $100,000 bond issued through the Woodrow W. Cross Agency in Bangor, Maine. There is no mention in the entire 39-page, 146-paragraph, Complaint of an "embezzlement" involving the Cross Agency. Further, the lion's share of the responsibility for the alleged misconduct with regard to the bond is asserted by Plaintiff to belong to the Cross Agency, who is not a named Defendant in this action.

Plaintiff suggests that the Court could address Defendants' concerns by requesting Defendants file a reply brief. First, Defendants should not have to reply to allegations raised for the first time in an objection to a summary judgment motion. Second, the Court has been offered quite enough to read in connection with the Motion for Summary Judgment.

Appendix E

8. Recapitulation.

Plaintiff's Response to Defendant MSB's Motion for Summary Judgment was only one day late. However, all but one of the other factors weighs against granting Plaintiff's Motion for Reconsideration. The pleading is extensive, and contains materials irrelevant to the Court's analysis. It arrived unaccompanied by so much as an acknowledgment that it was late, as have other of Plaintiff's filings. Plaintiff appears to continue to believe that she need only point out that the delay was minor. The Rules, including both Local Rule 19 and Federal Rule 6, provide otherwise.

Conclusion

Plaintiff's Motion to Reconsider the Court's Order Striking Plaintiff's Response to Defendant MSB's Motion for Summary Judgment is hereby DENIED.

SO ORDERED.

s/ Eugene W. Beaulieu
Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on December 12, 1994.

APPENDIX F — RECOMMENDED DECISION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MAINE FILED DECEMBER 8, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 94-0095-B

YVONNE RAMSDELL,

Plaintiff

v.

ERSKINE BOWLES, in his capacity as Administrator, United States Small Business Administration, et al.,

Defendants

RECOMMENDED DECISION

This action is brought for alleged violations of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, breach of contract and various common law torts including interference with contract and negligence. The allegations involve the financing by Defendant Machias Savings Bank ["MSB"] of several business ventures undertaken by Plaintiff's husband.

Pending before the Court is Defendant MSB's Motion for Summary Judgment.[1] Plaintiff's response to the Motion was filed

1. Joining in the Motion are Defendants Edward L. Hennessey, Jr., Frederic A. Reynolds, Richard H. Bagley, Clyde R. Crane, Charles A. Dinsmore, Jeffrey L. Goding, Gregory R. Coffin, and Donald A. Foster, all Directors of MSB. Unless necessary to differentiate these Defendants, they will be referred to collectively as "MSB."

one day late, prompting Defendant to file a Motion to Strike the Response. That Motion to Strike has been granted. Nevertheless, a failure to respond to a Motion for Summary Judgment does not amount to a waiver of Plaintiff's objection under Local Rule 19(c). Rather, "a party who fails to object in a timely fashion is deemed to have consented to the moving party's statement of facts to the extent that statement is supported by appropriate record citations." *FDIC v. Bandon Assoc.*, 780 F. Supp. 60, 62 (D. Me. 1991). The Court will therefore examine the merits of Defendant's Motion for Summary Judgment based on Defendant's Statement of Material Fact, which will be viewed in the light most favorable to Plaintiff *See, id.*

Discussion

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the 'potential to affect the outcome of the suit under applicable law.' " *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgato*, 990 F.2d 701, 703 (lst Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (lst Cir. 1993).

Factual Background

Ramsdell Construction Company ("RAMSDELL CONSTRUCTION") was formed in 1960 by Roland Ramsdell for the purpose of engaging in the general construction business

in the Machias, Maine, area. Plaintiff Yvonne Ramsdell is Roland Ramsdell's wife. Plaintiff has never held an interest in Ramsdell Construction.

Over several years, Defendant MSB made several loans to Roland Ramsdell and his son Kenneth Ramsdell for the purpose of financing their various business interests, including Ramsdell Construction and Machias Ford/Mercury, Inc. One such loan, issued in June, 1989, consolidated several of Ramsdell Construction's small loans. Plaintiff is a signatory on the June, 1989 loan.

In April, 1991, Defendant MSB made another consolidation loan to Ramsdell Construction in the amount of $170,000. The loan was secured by real property, including a gravel pit owned by Plaintiff, rental property and a private air strip located in Cutler, Maine. In addition to these properties, the Ramsdells had previously conveyed security interests in commercial property on Route 1, the Machias Ford/Mercury Garage, and an industrial park property.

In January, 1992, Defendant MSB mailed notices of default on the 1989 and 1991 loans. In response, Roland Ramsdell sought legal advice from attorney Francis Hallisey.

Roland Ramsdell and Francis Hallisey initially contemplated selling property to reduce the size of the construction business. After consulting with Kenneth Ramsdell, the decision was made to borrow up to $750,000, hopefully guaranteed by the U.S. Small Business Administration ["SBA"].

The Ramsdells applied for the SBA loan through Defendant MSB. They complied with an SBA recommendation that they

retain the services of a business consultant. The consultant, James Maxwell, prepared a cash flow analysis and business plan calling for a significant reduction in the size of Ramsdell Construction through the sale of real estate and non-essential construction equipment ["THE MAXWELL PLAN"]. The Ramsdells agreed to the plan, and presented it to both MSB and the SBA for the purpose of obtaining the loan in the amount of $483,700 to complete a significant construction project under a contract with the town of Lubec, Maine ["THE LUBEC PROJECT"]. Defendant MSB agreed to loan the Ramsdells a total of $350,000 on the condition that $75,000 of the loan proceeds be immediately applied to the previously declared defaults, and approval of the SBA. The loan closed in July, 1992.

Between the date of the loan application and the date the SBA loan closed, Ramsdell Construction continued work on the Lubec project. As subcontractors and vendors required payment, the Ramsdell's attorney arranged for the payments to be made at the closing. These payments, as well as the $75,000 paid to MSB, were acknowledged by Roland Ramsdell and Kenneth Ramsdell in writing. Plaintiff, pursuant to her husband's instructions, signed the closing documents, which were prepared by the Ramsdell's attorney.

After the loan closed, Ramsdell Construction continued work on the Lubec project. However, it did not sell non-essential equipment, as contemplated by the Maxwell plan. Further, it found it difficult to operate under the condition imposed by the loan agreement with the SBA that 36 percent of each payment made to Ramsdell Construction by the town of Lubec be remitted to the MSB and applied to the SBA loan.

In the fall of 1992, Ramsdell Construction, and Kenneth

Ramsdell and Roland Ramsdell, commenced a Chapter 11 bankruptcy proceeding. The Ramsdells were unable to convince the Court that there was sufficient income to be earned from the Lubec project to pay the expenses that would accrue. Ramsdell Construction defaulted on the Lubec contract, and the bankruptcy was converted to a Chapter 7 liquidation.

Count I — Equal Credit Opportunity Act

Plaintiff's claim in Count I of her Complaint is that Defendant MSB required her signature on the loans made to Ramsdell Construction in June, 1989, April, 1991 and July, 1992, (the SBA loan), solely for the reason that she is Roland Ramsdell's wife, despite the fact that he otherwise qualified for the loan. The Equal Credit Opportunity Act provides that no lender may "discriminate against any applicant, with respect to any aspect of a credit transaction . . . on the basis of . . . marital status, . . . " 15 U.S.C. § 1691(a)(1).

With two exceptions, neither of which apply in this case, civil actions for alleged violations of section 1961(a) must be brought within two years from the date of the occurrence of the violation. 15 U.S.C. § 1691e(f). The violation is deemed to have occurred at the time the lender presents documents requiring the spouse's signature. *Farrell v. Bank of N.H.*, 929 F.2d 871 (1st Cir. 1991). Plaintiff filed her Complaint in this action in April, 1994. Accordingly, Plaintiff's claim in Count I of the Complaint, to the extent based on the June, 1989 and April, 1991 loans, is barred as untimely.

With respect to the SBA loan, Defendant asserts that there is no evidence suggesting that Defendant required Plaintiff to sign the loan agreement solely because of her marital status. The Court

agrees with this characterization. As early as January, 1992, Defendant MSB mailed notices of default on the 1989 and 1991 loans. In response, Roland Ramsdell sought legal advice from his attorney. After contemplating selling property to raise the needed capital, and consulting with Kenneth Ramsdell, the decision was made to borrow the money. The SBA loan was only approved on the condition that $75,000 of the proceeds would be immediately applied to the loan defaults declared the previous January. This evidence suggests only that Ramsdell Construction, and Roland Ramsdell, were not "qualifie[d] under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 CFR § 202.7(d)(1). There is no evidence to the contrary. Defendants are entitled to summary judgment on Count I of Plaintiff's Complaint.

Count II — Breach of Contract

In Count II of her Complaint, Plaintiff alleges that Defendant MSB breached a provision in the loan agreement requiring the proceeds of the loan be used "only for the purchase of labor and materials pursuant to the Lubec project" by "diverting" proceeds to MSB for its benefit. The pertinent provision reads as follows:

> (b) Use of Proceeds of Loan as follows:
>
> 1. Approximately $350,000.00 to finance labor and materials necessary to comply with the terms of the contract with the Town of Lubec, Pollution Control Facilities Contract No. 2. Lubec Wastewater Transport System.
>
> 2. Balance, if any, to working capital.

3. Interim financing utilized for the above purposes may be repaid from loan proceeds.

Exh. 95 to Depositions (Exh. 10 to Depo. of Roland Ramsdell).

The term "interim financing" referred to the $75,000 Defendant required be paid immediately on the Ramsdell's deficiencies. The Town of Lubec forwarded $75,000 of the money retained on the contract with Ramsdell Construction to MSB to be applied to the deficiencies. Defendant MSB then made an "interim loan" of $75,000 to Ramsdell Construction for immediate working capital, needed to continue the Lubec project. At the time of closing, MSB received $75,000 as repayment on the "interim loan." Hallisey Depo. at 41-42. In short, Defendant's disbursement of $75,000 of the proceeds of the loan to itself constituted repayment of the interim financing under subsection (b)(3) of Exhibit A to the Loan Agreement. As such, it was not a breach of subsection (b)(1). Defendant is entitled to summary judgment on Count II of Plaintiff's Complaint.[2]

Count III —Aiding and Abetting Breach of Contract

In Count III, Plaintiff asserts that the Defendant Directors of MSB, by authorizing the "diversion" of $75,000 of the loan proceeds to MSB, aided and abetted the breach of contract.

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2. To the extent Plaintiff incorporated paragraph 46 of the Complaint into Count II, the Court finds that the record reflects these disbursements were requested by Roland Ramsdell, and/or Ramsdell Construction, for the purpose of appeasing several Lubec project creditors so they would continue to work with Ramsdell Construction on the Lubec project. They were thus payments made "to finance labor and materials necessary to comply with the terms of the contract with the Town of Lubec."

Having found no breach of contract in Count II, the Court concludes that the Defendant Directors are entitled to judgment as a matter of law on Count III of Plaintiff's Complaint.

Count IV — Interference with Contractual Relations

Plaintiff alleges in Count IV that MSB and its Directors interfered with her contract with SBA by "diverting" $75,000 of the loan proceeds to itself. A cause of action for interference with a contractual relationship requires a showing that " 'a person, by means of fraud or intimidation, procures, . . . the breach of a contract . . . , which but for such wrongful interference would have continued.' " *Perkins v. Pentleton,* 90 Me. 166, 17G (1897) *quoted in MacKerron v. Madura,* 445 A.2d 680, 683 (Me. 1982). First, the Court has found that the disbursement to MSB of $75,000 did not constitute a breach of contract. Second, there is no evidence whatsoever that MSB "through fraud or intimation" procured a breach by SBA. Defendants are entitled to summary judgment on Count IV of Plaintiff's Complaint.

Count V — Breach of Implied Duty of Good Faith and Fair Dealing

Plaintiff claims, in Count V of her Complaint, that "Machias Savings Bank is bound by an implied covenant to act in good faith and to deal fairly with Yvonne Ramsdell with regard to matters related to her contracts." She then alleges that MSB breached this implied duty of good faith and fair dealing in several ways.

There is no cause of action for breach of the duty of good faith under Maine contract law except to the extent provided by the Maine Uniform Commercial Code. *Renaissance Yacht Co. v. Stenbeck,* 818 F. Supp. 407, 412 (D. Me. 1993). Under the Code,

there is no independent cause of action for breach of the duty of good faith. 11 M.R.S.A. § 1-203 comment. Defendant is entitled to judgment on Count V of Plaintiff's Complaint.

Count VI — Interference with Contractual Relations — MSB

In Count VI, Plaintiff purports to state a claim against MSB for interference with the contractual relationship between the Town of Lubec and Ramsdell Construction Company. First, Plaintiff does not attempt to allege that the Town of Lubec breached the contract. Further, Ramsdell Construction Company is not a party to this litigation, Plaintiff is not a partner in Ramsdell Construction Company, and Plaintiff was not a party to the Lubec contract. In fact, she appears to allege damage only on the grounds that the business would have "generate[d] revenues adequate to service Yvonne Ramsdell's continuing obligations to the Bank." Complaint at ¶ 102. However, third party beneficiaries lack standing to assert claims for breach of contract, *Pstragowski v. Metropolitan Life Ins.*, 553 F.2d 1, 5-6 (1st Cir. 1977), let alone interference with contractual relations. Defendant is entitled to judgment as a matter of law on Count VI of the Complaint.

Count VII — Interference with Contractual Relations — Defendant Tennessee

Plaintiff's claims against Defendant Hennessey for interference with contract allege interference with both the Lubec contract, and Ramsdell Construction's relationship to the bank. Plaintiff's claim with regard to the Lubec contract fails for the reasons discussed in the previous section. Plaintiff's claim with regard to the Construction company's relationship with the bank fails for the reason that Plaintiff is not a principal of Ramsdell construction. In addition, the Court has previously determined

that there was no breach of the SBA loan agreement. Defendant Hennessey is entitled to judgment as a matter of law on Count VII.

Count VIII — Negligence

Plaintiff alleges that MSB undertook the task of preparing the application for the SBA loan, including a cash flow forecast. She alleges that the cash flow forecast was negligently prepared in that it did not account for various expenses which MSB should have known would be incurred in connection with the Lubec project. More particularly, she asserts that the cash flow forecast constituted a negligent misrepresentation upon which Ramsdell Construction relied, and that Plaintiff "executed and delivered the SBA Note and the Guaranty in reliance upon the representations by the Bank that the Lubec Contract would generate sufficient cash flow to repay the SBA loan." Complaint at ¶ 128.

Plaintiff's claim fails for the reason that MSB did not prepare the cash flow statement. Attorney Hallissey testified that he assisted Maxwell in preparing the cash flow analysis as part of the business plan that Maxwell was hired to prepare. Hallissey Dep. at 33-34. Further, there is no evidence that Plaintiff relied upon anything but her husband's instructions with regard to signing the loan documents. Plaintiff's own testimony is that when her husband told her to go to the bank and sign papers, she did so without asking why the business needed money or what the papers meant. Plaintiff Dep. at 13, 16-17. This general pattern held true with the SBA loan in July, 1992. *Id.* at 31-38. Plaintiff's complete understanding of the transaction was that she "knew [the company] needed some money to get along." *Id.* at 33. She "did not know the details." *Id.* In the Court's view, her testimony

provides no evidence whatsoever that she "executed and delivered the SBA Note and the Guaranty in reliance upon the representations by the Bank that the Lubec Contract would generate sufficient cash flow to repay the SBA loan."

Count XI[3]-- Negligent Infliction of Emotional Distress

There is no evidence on the record before us that Defendants were negligent with regard to Plaintiff's SBA loan. Further, there is nothing in the record to suggest that Defendants "reasonably *should have* foreseen that mental distress would result" if they *had* been negligent. *Gammon v. Osteopathic Hosp.*, 534 A.2d 1282 (Me. 1987) (emphasis in original).

However Plaintiff views the events enumerated in her Complaint, the fact remains that this case involves a financial transaction; specifically, a loan made to a company already in financial difficulty which failed to prevent the demise that was already underway. No reasonable person believes from the outset that a business venture of any sort is risk-free, or even that everyone connected to the venture will behave in only the most irreproachable manner. Plaintiff's emotional distress at the failure of her husband's business is understandable, but it is not actionable.

Conclusion

Accordingly, I recommend that the Court *GRANT* Defendants' Motion for Summary Judgment on Counts I through VIII, and XI of Plaintiff's Complaint.

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3. Counts IX and X stated claims against the Defendant SBA, which is not a party to this Motion for Summary Judgment.

Appendix F

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

s/ Eugene W. Beaulieu
Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on December 8, 1994.

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MAINE FILED DECEMBER 6, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 94-0095-B

YVONNE RAMSDELL,

Plaintiff

v.

ERSKINE BOWLES, in his capacity as Administrator, United States Small Business Administration, et al.,

Defendants

ORDER

Defendant Machias Savings Bank ["MSB"] filed a Motion for Summary Judgment in the above-entitled action on November 2, 1994. Plaintiff's response was filed on November 22, 1994, one day past the deadline.

Defendant has now moved to strike Plaintiff's response on three grounds. First, it argues that the response should be stricken for its untimeliness. Second, Defendant asserts that Plaintiff has included within her response documents which are protected from disclosure by virtue of the Court's Order dated August 30, 1994. Third, it argues that the response is replete with "immaterial, irrelevant, and prejudicial statements," amounting

to an attempt on Plaintiff's part to amend her Complaint in violation of the Court's Scheduling Order.

As to the confidential documents filed in connection with Plaintiff's response to the Motion for Summary Judgment, the Court notes that it is in receipt of a sealed envelope containing the notation: "DOCUMENTS TO BE FILED UNDER SEAL Pursuant to Order dated August 30, 1994 Entered by Magistrate Judge Beaulieu." According to Plaintiff's response to the Motion for Summary Judgment, the envelope contains the documents to which Defendant refers. It has not been opened. However, information from these documents was used to create a chart, attached as Exhibit B to Plaintiff's Memorandum in Response, showing a financial comparison of Ramsdell Construction and its competitor Hanscom Construction. The chart is not authenticated and has no evidentiary value. Accordingly, it would not be properly considered on the Motion for Summary Judgment.

On this issue of irrelevant arguments, the Court has compared the arguments propounded in the opposition to the Motion for Summary Judgment to the claims alleged in the Complaint, and must reluctantly agree with Defendant's characterization. In one example, Plaintiff argues that the statute of limitations should not apply to a portion of her claim under the Equal Credit Opportunity Act because she seeks equitable relief under 15 U.S.C. § 1691e(c). However, in Count I of her Complaint, Plaintiff requests "judgment pursuant to 15 U.S.C § 1691e(a) and (b) for actual damages . . . [and] punitive damages. . . . " There is no mention of equitable relief. Further, one of Plaintiff's characterizations of Count I, as a claim for recoupment, is properly raised only in defense. *Eg. FDIC v. Notis,* 602 A.2d 1164, 1166 (Me. 1992) (citing *In re Remington,* 19 B.R. 718 (D. Colo. 1982); *Marine Amer. State Bank v. Lincoln* 433 N.W. 2d 709 (Iowa 1988)).

Appendix G

The response time on this Motion to Strike has not expired. Nevertheless, the Court must rule on the Motion prior to considering the Motion for Summary Judgment, and it is within the Court's power to enforce its own local rules without benefit of Motion requesting that it do so. *See, Winters v. FDIC,* 812 F. Supp. 1 (D. Me. 1992). In this instance, while usually generous to those who miss by slight amounts various limitations on pleadings, the Court is persuaded that Plaintiff's response to the Motion for Summary Judgment is properly stricken.

Conclusion

Accordingly, Defendant Machias Savings Bank's Motion to Strike Plaintiff's Response to the Motion for Summary Judgment is hereby GRANTED, and the Response is STRICKEN.

SO ORDERED.

s/ Eugene W. Beaulieu
Eugene W. Beaulieu
United States Magistrate Judge

Dated In Bangor, Maine on December 6, 1994

APPENDIX H — OBJECTION TO ORDER DATED DECEMBER 9, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CIVIL ACTION
DOCKET NO. 94-0095-B

YVONNE RAMSDELL,

Plaintiff,

- versus -

ERSKINE BOWLES, in his capacity as administrator, United States Small Business Administration, et al.,

Defendants.

OBJECTION TO ORDER OF MAGISTRATE JUDGE AND REQUEST FOR REVIEW BY UNITED STATES DISTRICT COURT JUDGE PURSUANT TO F.R. CIV.P. RULE 72(a)

OBJECTION

Now comes Plaintiff Yvonne Ramsdell, acting by and through her attorney, Ralph A. Dyer, and objects to the Order of the Magistrate Judge in this matter dated December 6, 1994, striking Plaintiff's Response to the Motion for Summary Judgment of Defendants Machias Savings Bank and its Directors. Plaintiff Ramsdell requests review of the Order pursuant to F.R.Civ.P. Rule 72(a).

This motion is based on the argument set forth below, the accompanying affidavit and the Plaintiff's objection to the motion to strike.

Appendix H

INCORPORATED MEMORANDUM OF LAW

1. *Introduction*

This suit includes a nine Count Complaint against Machias Savings Bank and its Directors. These Defendants moved for summary judgment on November 2, 1994. The moving papers were very substantial in both complexity and content. Mrs. Ramsdell's response was equally detailed and it took the entire response period to complete. Despite the best efforts of counsel, the response was made by courier approximately 6 hours late, on the afternoon of November 22.

The Bank and Directors moved to strike the response on several grounds. The Magistrate Judge found the Plaintiff's response to be unduly tardy and to include irrelevant information; therefore, he granted the motion to strike forthwith before Plaintiff had an opportunity to respond to the Defendants' motion.

Not only are motions to strike rarely granted, the circumstances of this situation raise serious questions of due process and basic fairness. Computer based research reveals *no* precedent for this action. Mrs. Ramsdell's claim has been seriously and perhaps fatally injured by the Court's refusal to consider her response to a motion for summary judgment because that response was filed approximately 6 hours late.

Mrs. Ramsdell asks that the Order striking her response be reversed and that the Bank's and Directors' motion for summary judgment be considered on the basis of all information in the record.

Appendix H

2. *Argument*

The gist of the action against these Defendants is that Mrs. Ramsdell's rights under the Equal Credit Opportunity Act (15 U.S.A. § 1691 et seq.) were violated resulting in an affirmative claim for statutory damages and costs of suit, dedicated loan proceeds were unlawfully diverted by the Bank and the Directors for the benefit of the Bank, the Bank and its Directors acted in bad faith in the performance of loan and guarantee contracts, the Bank called diverted funds and placed onerous conditions on the principal borrower in order to eliminate the borrower as a competitor of a business in which the Bank President has both direct and indirect interests. It is alleged that the Bank, its Directors and the Bank President not only acted in bad faith, but also violated federal and state criminal laws.

As a result of the alleged wrongful conduct, the principal borrower is bankrupt and out of business. Mrs. Ramsdell has lost her marital interest in the family business and her real estate is being foreclosed. Mrs. Ramsdell claims to have lost approximate $1,600,000 as a result of the Defendants' misconduct.

This is a very serious claim involving a substantial amount of money.

The first question is whether the Plaintiff has good cause or other basis for filing a tardy response. Reference is made to the standards set forth in F.R.Civ.P. Rule 60(b). Relief is granted in this kind of situation for "mistake, inadvertence, surprise or excusable neglect." "Inadvertence" is defined as an accident or something occurring without negligence. No one suggests that the Plaintiff's failure to file a timely response was intentional or negligent. The fact is that the Plaintiff's counsel exercised due

diligence and reasonable effort to file a timely response. The sheer magnitude of the task caused the delay.

As indicated above, this is a factual and legally complex case described in a 39 page Complaint with a total of eleven Counts. The pleadings submitted by the Bank Defendants in support of their motion for summary judgment included a 20 page legal argument, approximately 82 statements of material fact including sub-parts, and more than 2 inches of documentary evidence. Despite vigorous editing, the responsive pleadings were of no less breadth, content or volume. Plaintiff was simply unable to complete the mechanics of printing, collating and filing her response within 10 days allowed by Rule 19(c), and by the time this conclusion was reached it was so late on the last day of the period that a request for enlargement of time was immaterial.

Plaintiff submits herewith the Affidavit of her attorney detailing the effort made to respond in timely fashion. The files relating to this case comprise approximately 8 file boxes which were indexed and sorted for access before November 2, 1994, in anticipation of the motion for summary judgment and trial. The Plaintiff had reorganized these files and had re-formulated and researched legal precedent in connection with a similar motion by the Bank in a related State foreclosure proceeding. Therefore, Plaintiff had a running headstart for a response.

Work began preparing the response as soon as the motion was received by Plaintiff's counsel on November 2. During the period November 2 through the time when the response was handed over to a courier on the morning of November 22, Plaintiff's counsel invested more than 57.19 hours of attorney time and more than 91.11 hours of paralegal time in preparing the response. These time estimates are very conservative, and it is represented that substantially more attorney time was invested that has not been

recorded on contemporaneous time slips. It is estimated that total attorney time is in excess of 75 hours. Despite these efforts, the documents could not be fine tuned and processed through the copying services on November 21. The entire staff worked well into the evening on November 21 in an attempt to complete the task and hand deliver it to Bangor before midnight. Counsel simply underestimated the effort required to complete this work. By the time this conclusion was reached the Court was closed, and common sense suggested that immediate filing by courier was the most reasonable course.

The Bank Defendants and the Court rely on *Winters v. FDIC*, 812 F.Supp. 1 (D.Me. 1992) as authority for striking the tardy pleading. Magistrate Judge Beaulieu's standards are far higher than those applied in *Winters*. As described in Plaintiff's objection to the motion to strike, *Winter* involved a request for reconsideration of a grant of summary judgment to consider responsive pleadings filed two days late and two days after judgment was granted. The Court did not find the two day delay to be unduly tardy, but that the responsive pleadings failed to present argument or evidence that would change the original decision. *Winter* suggests that the primary questions are the degree of culpability or negligence on the part of the party asking for relief and the prejudice to the opponent.

There is no suggestion of negligence on the part of Plaintiff's counsel or prejudice to the Bank Defendants. If Plaintiff reads Magistrate Judge Beaulieu's decision correctly, the reason why the pleading was stricken is because it was late and contains irrelevant argument.

The Court infers that its analysis consisted only of a comparison of "the arguments propounded in the opposition to the Motion for Summary Judgment to the claims alleged in the

Complaint." This comment was followed by an illustration of irrelevancy that Plaintiff is now requesting equitable relief under the Equal Credit Opportunity Act allowed only in defense to a claim on the note. It is assumed that the Court's cursory analysis did not permit digestion of all the arguments and facts alleged in the responsive papers; however, Plaintiff believes that the Court has misinterpreted the argument and, if this is the only example or irrelevance, the conclusion is wrong. One assumes that full consideration of the responsive papers might change the Court's first impression.

In any event, the responsive papers are substantial. The facts alleged are documented. Argued inferences and conclusions are based on evidence. Plaintiff knows of no precedent that says a pleading should be stricken because it contains irrelevant argument or, indeed, if the entire argument is irrelevant.

The fact that this pleading was stricken before Plaintiff had an opportunity to object is troublesome. Regardless of the strictures of Local Rule 19(c), F.R.Civ.P. Rule 12(f) and F.R.Civ.P. Rule 56, one has to consider F.R.Civ.P. Rule 1 and the basic goal to give every litigant a fair opportunity to present her case. Motions for default or to strike are not favored because they run contrary to the most basic notion of fair play and justice. The nature of the case and the moving papers make it conclusive that, if Plaintiff had requested an enlargement, it would have been granted. There was no negligence. This is a case when best efforts simply were not enough. There is no showing of prejudice or even inconvenience to the Court or to the Bank Defendants.

3. *Conclusion.*

If the Court requires blind adherence to Local Rule 19(c), the

bar should be advised. Practitioners need to know that there are no excuses in order to decide whether they want to subject themselves to these absolute requirements. Not only is this a personal consideration for lawyers, but also plaintiffs need to be told that the highly complex technical requirements and the expedited nature of Federal court administration leave no room for error whether reasonable or not.

Plaintiff's counsel has a duty to disclose the Court's Order to strike to his client. This has been done. It is an extremely difficult task to explain to a 72 year old woman that her case is in great jeopardy and she may not succeed in her suit against the Bank, the Bank Directors and the Bank President for loss of all her savings and property because the Court considers punctilious compliance with procedural rules to be more important than her day in court.

Dated: Portland, Maine
December 9, 1994

s/ Ralph A. Dyer
Ralph A. Dyer
Bar No. 1379
Attorney for Plaintiff
Yvonne Ramsdell
477 Congress Street
Portland, Maine 04101
(207) 773-6489

APPENDIX I — MOTION AND INCORPORATED MEMORANDUM OF LAW DATED DECEMBER 2, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil Action
Docket No. 94-95-B

YVONNE RAMSDELL,

Plaintiff,

-vs-

ERSKINE BOWLES, et al.,

Defendants.

MOTION AND INCORPORATED MEMORANDUM OF LAW OF MACHIAS SAVINGS BANK AND MSB DIRECTORS TO STRIKE YVONNE RAMSDELL'S OBJECTION TO THEIR MOTION FOR SUMMARY JUDGMENT

NOW COME the defendants.[1] Machias Savings Bank and MSB Directors and move that the Objection of Yvonne Ramsdell to the Defendants' Motion for Summary Judgment and all materials filed in supported of said objection be stricken. Alternatively, the moving parties request an Order striking so much of the Plaintiff's Statement of Material Facts in Dispute

1. Machias Savings Bank will hereinafter be referred to as "MSB". Edward L. Hennessey, Jr., Frederick A. Reynolds, Richard H. Bagley, Clyde R. Crane, Charles A. Dinsmore, Jeffrey L. Goding, Gregory R. Coffin, and Donald A. Foster are Directors of MSB and join in the Motion to Strike. They are hereinafter referred to as "MSB Directors."

(Local Rule 19), Plaintiff's Direct Response to Statement of Material Facts of Machias Savings Bank and Directors, and Memorandum of Law submitted in behalf of Plaintiff Yvonne Ramsdell in Opposition to Motion of Machias Savings Bank and its Directors for Summary Judgment as is indicated in the attached Exhibits be stricken on the grounds that said materials are immaterial, irrelevant, scandalous, and/or prejudicial to the Defendants and wholly without merit in this matter. As grounds for the within Motion, the moving parties say as follows:

A. The materials filed by Yvonne Ramsdell in opposition to the MSB Defendants' Motion for Summary Judgment should not be considered because they were untimely filed.

The moving parties served and filed their Motion for Summary Judgment together with all supporting materials on November 1, 1994. The Motion for Summary Judgment was filed with the court on November 2, 1994. Pursuant to Rule 19(c) of the Rules of the United States District Court for the District of Maine any and all opposing materials to said Motion were to have been filed no later than Monday, November 21, 1994. All material facts set forth in the Statement of Material Facts filed with the Motion for Summary Judgment are deemed to be admitted unless properly controverted by an opposing statement of disputed facts timely filed in accordance with Rule 19(c). *See* Rule 19(b)(2) of the local rules.

Plaintiff Yvonne Ramsdell, through her counsel, is aware of the fact that Rule 19(c) governed the deadlines for filing and, in fact, moved for an enlargement of time up to and including November 21, 1994 in which to file her response to the Motion for Summary Judgment, having calculated the time that the response

was due as November 18, 1994. That Motion for Enlargement of Time was not received by the Court until November 21, and at that time endorsed "moot" on the grounds that pursuant to Local Rule 19(c), the deadline for filing opposition was November 21, 1994. Nonetheless, notwithstanding the clear expression of the Court as to the date by which the filings were due, the Plaintiff did not file any opposition materials to the Motion for Summary Judgment until November 22, 1994. Furthermore, Plaintiff did not serve any of those opposition materials upon the Defendants in this matter until November 22, 1994, by mail. Where the Plaintiff failed to comply with the requirements of Rule 19(b) and (c) in a timely fashion, those opposition materials must be stricken. *See Winters v. Federal Deposit Insurance Corporation,* 812 F.Supp. 1, 1 (D.Me. 1992), upheld on reconsideration (D.Me. 1993).

The *Winters v. FDIC* matter refused to consider opposition materials filed by a defendant in opposition to a Motion for Summary Judgment on the grounds that those materials were filed two days after the deadline under Rule 19(c). *Id.* at 4. The materials were available to the court at the time it reviewed the Motion for Summary Judgment, but the court did not consider the opposition materials because they were untimely. The *Winters* Court noted that it has a strong institutional interest in punctilious observance of the local rules. *Id.* at 5, citing *Cardente v. Fleet Bank of Maine, Inc.*, 146 F.R.D. 13, 23 (D.Me. 1993). In the within matter, where there should have been no uncertainty as to the date by which the materials were due to be filed because of the clear requirements of Rule 19(c) and because of the clear endorsement on the late filed Motion for Extension of Time, the untimely filing of Yvonne Ramsdell's objection requires it to be stricken.

That the untimely filing of these materials is not an isolated occurrence buttresses the conclusion that the materials ought to be

stricken. Plaintiff has failed to file with the court in a timely fashion her final pretrial brief, which was due to be filed on or before December 1, 1994 (five business days prior to the final pretrial conference). Local Rule 20(b).

Finally, the surfeit of immaterial, irrelevant, and prejudicial statements in the proposed opposition materials which render those opposition materials of no utilitarian benefit to the court in reviewing the Motion for Summary Judgment mandates a conclusion that the opposition materials must be stricken. *See Winters v. FDIC*, 812 F.Supp. at 5; see also *infra*.

WHEREFORE, the moving parties ask that the within Motion be allowed and that the Objection of Yvonne Ramsdell to the Defendants' Motion for Summary Judgment and all materials filed in supported of said objection be stricken.

B. So much of the opposition materials which are demarcated on the attached Exhibit A ought to be stricken on the grounds that the contain scurrilous, scandalous material which is utterly immaterial to the claims asserted by the Plaintiff in this matter.

The moving parties ask that the within Motion to Strike be allowed with regard to those portions of the Plaintiff's Statement of Material Facts in Dispute (Local Rule 19), Plaintiff's Direct Response to Statement of Material Facts of Machias Savings Bank and Directors, and Memorandum of Law Submitted in Behalf of Plaintiff Yvonne Ramsdell in Opposition to Motion of Machias Savings Bank and its Directors for Summary Judgment as are demarcated on the attached Exhibit A. As grounds for the within Motion, the MSB Defendants state that those portions which are outlined in the attachment herein are wholly irrelevant,

scandalous and prejudicial to the Defendants. Throughout the materials which are highlighted in the attachments, the Plaintiff has asserted, without factual basis, purported acts of embezzlement, illegality, criminal conduct, and fraud which have absolutely no bearing upon the Complaint filed in the within matter.

The Complaint is a Complaint alleged in eleven counts. The Complaint contains 39 pages. A comparison of the allegations in the Complaint with the demarcated portions of the opposition to the summary judgment materials filed by Yvonne Ramsdell shows that the only reason for the scurrilous and scandalous suggestions made by Ms. Ramsdell and her attorney in her opposition must be to divert the Court's attention from the "merits" of her case. The statements and purported "facts" have absolutely no bearing on any of the facts alleged in the Complaint. Thus, as an example, and without limiting the scope of the Motion to Strike, the moving parties direct this Honorable Court to the Complaint which contains absolutely no claim against any Defendant for tortious conduct or otherwise arising from an alleged payment to one Woodrow W. Cross Insurance Agency. Nonetheless, the Plaintiff reports in the Motion for Summary Judgment from pages 27 to 29, alleged facts relating to a supposed Royce Cross Agency embezzlement. No such embezzlement has been alleged, no such embezzlement has any connection or component to this case, and no such embezzlement has ever occurred. It has absolutely no bearing on this case, it is irrelevant to the matter at hand and ought not to be part of the pleadings.

Similarly, the Plaintiff vociferously complains in her opposition materials about a supposed "fraudulent diversion of approximately $161,000 from the proceeds of an SBA guaranteed loan." *See* p. 1 of Yvonne Ramsdell Memorandum of Law

Appendix 1

Submitted in Opposition to Motion for Summary Judgment. No cause of action has ever been asserted by Ms. Ramsdell related to any such supposed diversion. There is no reason or factual basis or legal basis for having now at this late date changed the facts pleaded and made reference to them. Therefore, the materials can only be treated and deemed to be scurrilous, scandalous and prejudicial and absolutely irrelevant. They must therefore be stricken. *See* Fed.R.Civ.P. 12(f).

As a further example, and certainly not to limit the scope of the within Motion to Strike, the moving parties note that Yvonne Ramsdell devotes much energy in her opposition materials to loans which are not at all the subject of this action. The only loans about which Ms. Ramsdell has complained in this action are those identified in Court I of her Complaint. There is no meritorious reason, therefore, for her to expend the Court's time and energy on matters which have no bearing or relevance on the pleadings, particularly where they are clearly advanced for the purpose of prejudicing the Defendants. For these reasons, the Plaintiff asks that the within Motion to Strike be allowed.

Where a Motion to Strike is appropriate to remove from a complaint scandalous and immaterial allegations which do nothing to advance the claims of a party, *see* Fed.R.Civ.P. 12(f), it is certainly appropriate to enter an order striking such portions of memoranda and supporting materials which are of such a nature and which cannot remotely be said to relate to the cause of action pleaded by the Plaintiff.

WHEREFORE, the MSB Defendants ask that the demarcated portions of the opposition of Yvonne Ramsdell to the MSB Defendants Motion for Summary Judgment be stricken.

Appendix I

C. The demarcated portions of the opposition materials should be stricken as they are tendered by the Plaintiff in an unwarranted attempt to amend her complaint.

The Plaintiff is clearly raising these matters outlined above and indicated in the demarcated portions of the opposition materials at this late date in a haphazard and inappropriate effort to amend her Complaint. As the Court has been advised before, these parties have been embroiled in litigation since February 1993 when Machias Savings Bank commenced an action to foreclose its various mortgages granted by Mrs. Ramsdell and others. In that proceeding, Mrs. Ramsdell was granted by the Court until September 30, 1993 to bring any counterclaims which she saw fit to allege. Mrs. Ramsdell allowed the deadline for filing such counterclaims to expire, alleging no causes of action arising out or related to the transactions which are the subjects of the loans.

Seven months later, Mrs. Ramsdell commenced the within action in Federal District Court. A scheduling order was issued by the Court, a deadline by which all amended pleading or Motions to amend pleadings was filed and no Motion to Amend Pleadings was brought by Mrs. Ramsdell. Discovery has been closed. All opportunities for filing dispositive motions has expired and this matter now is scheduled to be pretried on December 7, 1994. The matter is scheduled to be tried in January of 1995. Mrs. Ramsdell's belated efforts to amend her pleadings by raising in opposition to the Motion for Summary Judgment matters which have absolutely no bearing on the suit ought to be thwarted and the Motion to Strike, therefore, ought to be allowed. *See Winters v. FDIC,* 812 F.Supp. at p. 5 (noting that immaterial submissions are not of any assistance in defeating a Motion for Summary Judgment and ought not to be considered).

Appendix I

As an example, with regard to the ECOA claim, which Plaintiff must concede is brought beyond the statute of limitations as to two of the three loans which are the subject of the complaint, she at this late date has recast her pleadings as a claim for equitable relief. The complaint asserts no such claim and cannot, by way of opposition to a motion for summary judgment be restated as though it does. Similarly, she argues that her cause of action against the MSB Directors is not an action for "aiding and abetting breach of contract" (as alleged in the complaint) at all but rather a claim for piercing the corporate veil. Such wishful thinking cannot be permitted as a basis for amending the complaint when no authority to so amend exists.

WHEREFORE, the MSB Defendants ask that the within motion to strike be allowed and that the demarcated portions of the opposition by stricken from the opposition materials.

D. So much of the opposition materials as wrongfully discloses or makes use of confidential, sealed business information of Hanscom Construction, Inc. must be stricken as that material is used in violation of this court's Order dated August 30, 1994.

Plaintiff has repeatedly disclosed and made use of confidential business information of Hanscom Construction, Inc. in her opposition materials. Such use is directly contrary to the terms of this Court's Order on Hanscom Construction Company's Motion to Quash entered on August 30, 1994. That Order prohibited the Plaintiff from divulging the contents of the tax returns produced under that Order. Plaintiff should not be permitted to arbitrarily and flagrantly violate the terms of this Court's Order and, therefore, those portions of the opposition materials which divulge that confidential information must be

stricken.

For the reasons stated herein, the moving parties ask that the within Motion to Strike be allowed and that they be awarded such other and further relief as this Court deems appropriate.

DATED: December 2, 1994

MACHIAS SAVINGS BANK AND THE MACHIAS SAVINGS BANK DIRECTORS

By: Stephen G. Morrell
Bar Roll No. 0198

s/ Judy A. S. Metcalf
By: Judy A.S. Metcalf
Bar Roll No. 1768

Eaton, Peabody, Bradford & Veague, P.A.
167 Park Row
Brunswick, ME 04011
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Appendix I

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the above and foregoing Motion of Machias Savings Bank and MSB Directors to Strike Yvonne Ramsdell's Objection to Their Motion for Summary Judgment, was mailed, postage prepaid, on the 2nd day of December, 1994 to the following counsel of record:

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Stephen G. Morrell

Supreme Court, U.S.
FILED
DEC 29 1995

No. 95-842

In The

Supreme Court of the United States

October Term, 1995

YVONNE RAMSDELL,

Petitioner,

vs.

MACHIAS SAVINGS BANK, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents take issue with the question as presented by the Petitioner, insofar as her response to Respondents' Motion for Summary Judgment was not stricken on the basis of Rule 12(f) of the Federal Rules of Civil Procedure.

The question is, thus, whether Petitioner was accorded due process by virtue of the Magistrate Judge's application of Local Rule 19(c) of the United States District Court for the District of Maine and the *de novo* review of the district court's judgment on the merits, conducted by the court of appeals.

LIST OF PARTIES

The list of all corporate parties, parents and subsidiaries contained in the petition pursuant to Rule 29.6 is complete.

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STATEMENT OF THE CASE

Respondents generally adopt the Petitioner's statement of the case, but wish to clarify several critical aspects of the procedural history of this case omitted from Petitioner's recital.

First, the Petitioner omits, from her statement of the case, that she moved for an extension of time to file her opposition to Respondents' Motion for Summary Judgment until November 21, 1994 (the date on which it would have been due, in any event, under local Rule 19(c) of the District of Maine). She filed her opposition on November 22, 1994.

Second, the Respondents' motion to strike was not based upon Rule 12(f) of the Federal Rules of Civil Procedure. Rather, relying upon the inherent authority of the district court to enforce its rules, the Respondents moved to strike the opposition as untimely. They also asked that certain marked material be struck as immaterial , impertinent, and prejudicial, and as barred by an earlier confidentiality order issued by the Magistrate Judge. Indeed, the only reference to Rule 12(f) in the motion to strike was a citation by analogy. (Appendix I, at p. 50a). The Magistrate's order that the response be stricken does so relying on "the Court's power to enforce its own local rules" and makes no reference, by analogy or otherwise to Rule 12(f). (Appendix G).

Upon reconsideration of his order striking the opposition materials, the Magistrate evaluated whether Petitioner's late filed materials should be considered in the context of the seven factors set forth in the First Circuit decision, *United States v. Roberts*, 978 F.2d 17, 21-22 (1st Cir. 1992). Applying the balancing test prescribed by *Roberts*, the Magistrate examined the utility of the materials which had been stricken. The Magistrate enumerated many examples of the manner in which those materials have no relationship to the matters addressed by the complaint nor the

Motion for Summary Judgment. He, therefore, concluded that the opposition had no utility to the Court. (Appendix E, at 21a).

Having stricken the opposition materials as untimely, the Magistrate, nevertheless, recognized that "a failure to respond to a motion for summary judgment does not amount to a waiver of Petitioner's objection under Local Rule 19(c)." Rather, a party who fails to object in a timely fashion is deemed to have consented to the moving party's statement of facts to the extent that statement is supported by appropriate record citations. The Magistrate, then, examined the merits of Respondents' motion and analyzed it "in the light most favorable to Petitioner." (Appendix F, citing *FDIC v. Bandon Assoc.*, 780 F. Supp. 60, 62 (D. Me. 1991)).

Subsequently, the Petitioner filed a brief seeking de novo review of the Magistrate Judge's recommended decision. (Appendix D at 15a). The district court issued its order on January 3, 1995, adopting the recommended decision and granting judgment for the Respondents. (Appendices D and C). Finally, the First Circuit Court of Appeals reviewed the judgment of the district court on the merits. The First Circuit affirmed the entry of judgment in favor of Respondents, noting that "Mrs. Ramsdell failed to show that she suffered prejudice as a result of the magistrate judge striking her opposition to the motion for summary judgment."

REASONS FOR DENYING THE WRIT

I.

ENFORCEMENT OF LOCAL RULE 19(c) OF THE DISTRICT OF MAINE DOES NOT INFRINGE UPON THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION ABSENT A SHOWING OF EXCUSABLE NEGLECT.

The power of lower federal courts to disregard untimely pleadings is not absolute. In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership et al.*, 507 U.S. 380 (1993), this Court construed federal rules of bankruptcy procedure which set forth deadlines for filing proofs of claim. In that context, this Court interpreted the "excusable neglect" language in Federal Bankruptcy Rule 9006 to encompass an attorney's late filing of a proof of claim which omission was ascribed to an ambiguity in the notice establishing the bar date. While this petition may be distinguished by reason of the absence of any reference to "excusable neglect" in Rule 19(c) of the District of Maine, *Pioneer* is especially instructive in evaluating this petition, as well as the merits of this appeal. Notwithstanding the lack of accommodation for excuse in the language of the local rule, the imposition of sanctions for failure to plead on a timely basis in the First Circuit does require a balancing of interests to determine whether the dereliction is, otherwise, excusable. *United States v. Roberts*, 978 F.2d 17 (1st Cir. 1992). In *Pioneer*, this Court cited *Roberts* with approval, noting that the factors enunciated therein are consistent with the "excusable neglect" standard incorporated in Fed. Civ. Proc. R. 6(b). 113 S. Ct. 1489, 1496 n. 9 (1993). Petitioner, however, fails to identify in her petition grounds which would justify a tolling of the ten day period within which to oppose Respondents' Motion for Summary Judgment prescribed by Rule 19(c) of the District

Court of Maine. The Magistrate found her reasons insufficient when applying the *Roberts* test. (Appendix E).

Absent some extraneous reason which impaired her ability to act within the same time period imposed upon every litigant before the United States District Court in Maine, or other excusable neglect, the enforcement of Rule 19(c) is within the inherent power of the magistrate judge, subject to the supervision of the district court judge and reviewable by the court of appeals for abuse of discretion. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). Rather than suggest that her neglect should be excused, Petitioner argues that the penalties outlined in Rule 19(c) are too severe. Deadlines may lead to unwelcome results, but they prompt parties to act, and they produce finality. *Taylor v. Freeland & Krong, et al.*, 503 U.S. 638 (1992).

Federal procedural rules have long been enforced, to the letter, even when the consequence of enforcement is to bar federal review of constitutional claims. *Yakus v. United States*, 321 U.S. 414 (1944); *Browder v. Director, Illinois Dept. of Corrections*, 434 U.S. 257 (1978).

In resolving similar due process questions as those raised by the Petitioner, this Court has held in the context of state imposed procedural rules, "It is beyond dispute that a state may erect reasonable procedural requirements to the exercise of a right to an adjudication." *Logan v. Zimmerman Brush Co.*, 45 U.S. 422, 102 S. Ct. 1148, 1157 n. 7 (1982). Due process mandates only a meaningful opportunity to assert a claim. 102 S. Ct. at 1157. There is a vital interest to be served by procedural rules because these rules channel disputes to the stage of the judicial process in which they can most fairly and effectively be resolved. *Coleman v. Thompson*, 111 S. Ct. 2546, 2564-65 (1991).

Local Rule 19(c) has been the subject of considerable

litigation in the state of Maine. *See, e.g., Cardente v. Fleet Bank of Maine, et al.*, 146 F.R.D. 13 (D. Me. 1993). Attorneys practicing in Maine have long been on notice that the rule is strictly enforced. *Gideon v. Administrator U.S. Small Business Administration*, 102 F.R.D. 604, 607 (D. Me. 1984) ("compliance with Local Rule 19(c) is indispensable to the orderly, efficient and expeditious management of the extensive motion practice of this Court."). It was amended in 1993 to resolve earlier perceived ambiguities so that there can be no question about its interpretation or its application to the facts of any given case.

Thus, the ambiguity which weighed in favor of finding "excusable neglect" in *Pioneer Investment* is absent in this case. Rule 19(c) is precise. The district court's enforcement of the rule is notorious. Furthermore, Petitioner failed to meet her own self-imposed deadline. She requested until November 21 to file her opposition materials. She filed them on November 22.

Petitioner's argument that there should be some lesser penalty, short of striking her response to Respondents' Motion for Summary Judgment is presumptuous. It ignores the myriad decisions interpreting the rule, as well as the amendments clarifying the rule. The argument also presumes that the court considered her to have waived all objections to the motion for summary judgment. That is not the case. Pursuant to Rule 19(c), a party who fails to object in a timely fashion is deemed to have consented to the moving party's statement of facts only to the extent that statement is supported by appropriate record citations. Summary judgment is appropriate only if the record before the court establishes the moving party is entitled to a judgment as a matter of law. Therefore, the striking of Petitioner's opposition did not bar her from obtaining a favorable ruling based on issues of law presented by the motion if she was entitled to one. Moreover, had the Magistrate or the district court ignored disputed material issues of fact as a result of striking the

opposition, Petitioner could have called them to the attention of the court of appeals in her brief on appeal. She did not and the court of appeals affirmed the district court judgment, in part, due to her omission.

II.

THERE IS NO INTER-CIRCUIT CONFLICT TO BE RESOLVED BY THIS COURT.

Petitioner's reference to *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 948 (9th Cir. 1993), as evidence of an inter-circuit conflict is completely inapposite. In *Gill*, the appellate court ruled that the district court had erred in entering partial summary judgment solely on the basis of a local rule violation. The trial court's discretion was held to have been abused when exercised to grant a motion for summary judgment when the movant's papers were insufficient, standing alone, to support the motion. Here, of course, following examination by the magistrate and *de novo* review by both the district court and the court of appeals, the Respondents' papers were deemed to be sufficient to support a judgment in favor of Respondents.

The *Gill* decision does not fly in the face of practice in the district of Maine for the simple reason that the local rule reviewed is utterly different from Local Rule 19(c). The local rule of the District Court of Arizona which was reviewed by the Ninth Circuit stated:

> If the opposing party does not serve and file the required answering memoranda . . . such non-compliance may be deemed a consent to denial or granting of the motion summarily.

See Gill at *id.* 14 through 15 quoting Local Rule 11(i) of the

District Court of Arizona. This rule was struck down by the Ninth Circuit as too draconian in the context of a summary judgment proceeding because it eliminated the need of the moving party to meet the initial burden of proof on the elements of the case. *Id.* at 15 through 17.

The decision cited by Petitioner known as *John v. Board of Trustees for State Colleges and Universities*, 757 F.2d 698 (5th Cir. 1985), similarly does not present a disposition that is at odds with the standard adopted by the First Circuit and the District Court of Maine. Just as the Arizona local rule was more draconian than the District Court of Maine's Rule, so the Louisiana local rule was not of the same tenor. The local rule examined by the Fifth Circuit in the *John* case provided:

> If the respondent opposes a motion, he shall file his response, brief, and such supporting documents as are then available within 10 days after service of the motion.

The rule was silent as to the consequences of the failure to file, and the court decided that the failure to file an opposition on a Motion for Summary Judgment, in and of itself required the granting of the motion. The Fifth Circuit, upon review of the District Court's decision, found that this result was at odds with the provisions of Federal Rule of Civil Procedure 56 which permits the entry of summary judgment only if the record establishes that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.* at page 707.

III.

THE PROCEDURE FOLLOWED BY THE MAGISTRATE JUDGE IN ENFORCEMENT OF LOCAL RULE 19(c) IS CONSISTENT WITH THE PROCEDURE ESTABLISHED BY RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Clearly, the power to enforce procedural rules is also constrained by the Federal Rules of Civil Procedure. Rule 83 Fed. R. Civ. P. gives each district court the authority to "make and amend rules governing its practice not inconsistent with [Federal Rules of Civil Procedure.]" A local rule that is inconsistent, on it face, with the federal rules cannot stand. Moreover, it would be inappropriate to sustain a district court's construction of its own rules, if that construction rendered an otherwise valid local rule inconsistent with the federal rules. *See Woodman v. American Cystoscope Co.*, 335 F.2d 551, 556 (5th Cir. 1964). So, a construction of Rule 19(c), in the context of a summary judgment motion, which is inconsistent with Rule 56 of the Federal Rules of Civil Procedure cannot stand. However, the application of Rule 19(c) in this case is consistent with Rule 56 in both its literal language and in the construction given it by the Magistrate Judge.

Rule 56(e) provides, in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56 imposes the initial burden upon the moving party to demonstrate an entitlement to judgment based upon the record. It shifts the burden to the non-moving party only after the moving party discharges the initial burden of demonstrating that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgments as a matter of law." There is no consequence to the defaulting non-moving party until the movant establishes a *prima facie* case. If the moving party fails to discharge this burden, summary judgment must be denied — even if the non-moving party has not responded to the motion.

Preliminarily, the Magistrate found that Petitioner's opposition materials were of no utility in evaluating Respondents' motion. (Appendix E, p. 21(a); Appendix G, p. 36(a)). Once Petitioner's opposition was stricken, the Magistrate entered into a separate analysis of the facts as presented by Respondents to determine whether the materials filed in support of summary judgment entitled the Respondents to summary judgment. The Magistrate found that the evidence on record sustained Respondents' defenses before recommending that judgment be entered for Respondents, as prescribed by Rule 56(e).

IV.

RULE 12(f) IS NOT IMPLICATED IN THE JUDGMENT BELOW.

In granting the Motion to Strike before Petitioner filed a timely opposition, the Magistrate Judge relied on the Court's inherent power to enforce its rules as enunciated in *Winters v. FDIC*, 812 F. Supp. 1, 3 (D. Me. 1993). The argument that Petitioner was deprived of her due process rights by virtue of the

striking of a memorandum pursuant to Rule 12(f) is, thus, a contrivance. No such finding is referenced in the entire order.

CONCLUSION

Petitioner's opportunity to be heard was not expunged by reason of her failure to file opposition materials on time. On her appeal to the court of appeals, she had the opportunity to come forward with record references to demonstrate a genuine issue of fact for trial. She failed to do so. The application by the magistrate judge of Local Rule 19(c) was consistent with the manner in which summary judgment motions are to be adjudicated pursuant to Rule 56 of the Federal Rules of Civil Procedure. Rule 56, while it requires the non-moving party to come forward with evidence in addition to that which may have been alleged in the complaint, preserves the rights of a defaulting non-party by requiring that the moving party sustain its initial burden of proof that there is no genuine issue of fact for trial.

Insofar as the foregoing represents the procedure enunciated by the federal rules and applied uniformly in the federal courts, Petitioner's petition for writ of certiorari should be denied.

Dated: December 28 , 1995

Respectfully submitted,

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